from his resources such means as may be reasonably necessary for the support of his family. His creditors, therefore, cannot pursue and reach the money of the husband and father paid for such necessary purposes, as the maintenance of the family and edueation of the children. But subject to that right, the debtor must devote his property and means to his creditors. If the husband takes money which ought to pay his debts and invests in the purchase of real estate or other property for wife or children, the transaction may be fraudulent or not, as the husband may be indebted or not, and then by a comparison of his debts with the resources retained by him. If he was insolvent at the time of the purchase, the evidence is overwhelming and conclusive that the motive was to make a gift at the expense of creditors, and that the intent was to withdraw his means from their reach."

CHARLES BURKE ELLIOTT.

Minneapolis.

Supreme Court of Michigan.

LLOYD *v.* WAYNE CIRCUIT JUDGE.

A statute which provides for the *ante mortem* probate of a will is inoperative and void.

A proceeding authorized by such statute by which questions as to competency, undue influence, &c., can be determined in advance of the testator's death, is not within any recognised judicial power, and the courts cannot be called upon to enforce it.

MANDAMUS.

John H. Bissell, for relator.

The opinion of the court was delivered by

CAMPBELL, J.—In this case Lloyd attempted to have his will established during life in the Probate Court for Wayne county, and an appeal was taken from the Probate to the Circuit Court. In that court the circuit judge was of opinion that the proceeding was extra-judicial, and refused to allow it to go on; but instead of dismissing or quashing it on that ground, entered an order affirming the probate decree. *Mandamus* is now applied to vacate that order.

There can be no doubt of the impropriety of the order of the Circuit Court. By affirming the probate order he asserted jurisdiction, and he had no right to affirm it without a hearing on the merits. But whether he should proceed to such a hearing is the principal question before us. The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living

are unheard of in this country or in England; and inasmuch as the statute only makes the decree effective in the single case of the establishment of the will and subsequent death without revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire, or to oust the jurisdiction by change of residence, or to leave the will once rejected open to probate in the usual way after death, the proceeding is still more anomalous. I am disposed to think with the circuit judge, that this is not in any sense a judicial proceeding which he was bound to consider or entertain.

This is the first instance in our jurisprudence in which an attempt has been made to compel a living person, as a condition of relief, to enter upon a contest with those who, until his death, can have no recognition anywhere, and who after his death are presumed to represent him, and not any hostile interest. The maxim that the living can have no heirs is as well settled by statute as by common law. Until a man dies it can never be known who will succeed him, even if intestate; and whatever may be the probability, there is no certainty that a single one of the persons who have come in here to oppose the will may survive the testator. The law gives no preference to contingent expectations, and legally it is just as possible that the state may take by escheat as that the person now litigating, or any other more remote relatives will become interested. It is also within the power of relator to dispose of his entire property, not merely by a new will, but by sale or gift, and in such event there will be nothing for this will to dispose of and possibly nothing for these or any other kindred to inherit. It is also competent for him to go into another county or state or country, either of which acts would put his estate beyond the jurisdiction of Wayne county; and either of the two latter may change the course of inheritance or otherwise affect the disposal of his estate.

I cannot conceive it possible that the proceeding can be dealt with as judicial when the chief party to it will not be precluded by the decree from doing exactly as he might have done had the court never been called on to act at all. This statute, which was probably designed to prevent the unseemly and disgraceful attempts too often made to defeat the enforcement of the last will of persons whose competency to deal with their own affairs was never doubted or interfered with, has been so drawn as to remove none of the difficulties, but rather to make them worse. It is a singular, and in

my judgment a very unfortunate spectacle, to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases.

The practice which has usually prevailed in civil law countries, and also is said to have been customary in various parts of England (see Seld. Ecc. Jur. Test. 5) of having wills executed or declared in solemn form, or acknowledged before reputable officers and a sufficient number of disinterested witnesses to render it unlikely that the testator is not acting with capacity and freedom, has been approved by the continued experience of most countries, and has saved them from the *post mortem* squabblings and contests on mental condition which have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators. There is no sensible reason why a will which is always revocable and contingent should not be established, presumptively at least, by such an acknowledgment as will suffice to prove a deed which is irrevocable; and where, as is usually the case abroad, such an acknowledgment is made before trustworthy officers, in the presence of known and reputable witnesses, and in the enforced absence of all other persons, the security against incapacity and incompetency is quite as strong as can be found in a contest before a court or jury that never saw the testator. A man's incapacity, if it exists, will not easily escape the notice of his disinterested friends and neighbors, and when they certify to his competency and freedom of action with their attention directly called to their own responsibility in doing so, they are seldom mistaken, and those who seek to impugn their action, if allowed to do it at all, should be compelled to assume the burden and risk themselves. But this is not judicial action.

In the proceedings of various kinds familiar in England, where conveyances are made effective by acknowledgment and enrolment before various classes of public officers and tribunals, it was never deemed proper or necessary to bring general heirs presumptive before the acknowledging officer, in order to give efficacy to transfers in fee simple, either of man or woman, although they are as clearly affected in their prospects of inheritance as they would be by a will. And in the cases where testimony is to be perpetuated for use in

future controversies, the rule is inflexible that no matter how great the probability of inheritance may be, the heir presumptive is not either a competent or permissible party to such litigation; and this is so even in case of estates tail, and although the circumstances are as strong as possible against the chances of any change: *Earl Belfast* v. *Chichester*, 2 Jac. & W. 439; *Allan* v. *Allan*, 15 Ves. 130; *Lord Dursley* v. *Fitzhardinge*, 6 Id. 251; *Sackvill* v. *Aylesworth*, 1 Vern. 105; *Smith* v. *Attorney-General*, 6 Ves. 260; S. C., in note 1 P. Wms. 117.

The broadest definition ever given to the judicial power, confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs. Our statutes have never undertaken, and do not in this case undertake to give to the heirs any interest which will ever be fixed by this probate, or which may not be cut off at any time by their own death, or by relator by new will or conveyance. It is by no means free from doubt what classes of probate proceedings under our system are to be treated as judicial proceedings in the proper sense of that term; and it is not important here to consider that question, because this proceeding is not even a suit for probate. There has never been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes, is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of the estates. This rule is so general, that in some states devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately. This statute does not attempt to change the place of ultimate probate, and it does not make a decree against the will either a bar or even admissible to prevent future probate after death. It makes no provision for making a finding either way evidence for any purpose during testator's life, so as to negative testamentary capacity, or otherwise to affect him. And it has no force for any purpose so long as he lives.

I am of opinion that the statute is inoperative, as not within any recognised judicial power, and that the courts can not be called

upon to administer it, and that the *mandamus* should vacate the whole proceedings.

SHERWOOD and CHAMPLIN, JJ., concurred.

This case is one of great interest both on account of the novelty and importance of the principles involved. So far as we can learn, the statute in question is new in principle, and the decision thereupon is certainly unique. As the statute, which is published in the Public Acts of Michigan for 1883, on page 17, may not be accessible to all the readers of the Register, and is not given in the opinion, we reproduce it here.

"An act to provide for the establishment of wills during the lifetime of testators.

"Sect. 1. The people of the state of Michigan enact, that to any will heretofore or hereafter executed, the testator may make and annex his petition, to be sworn to before and presented to the judge of probate for the county where the testator resides, asking that such will be admitted and established as his last will and testament.

"Sect. 2. Every such petition shall contain averments that such will was duly executed by the petitioner without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents, and that the testator is of sound mind and memory and full testamentary capacity, and shall state the names and address of every person who at the time of making and filing the same would be interested in the estate of the maker of such will as heir if such maker should at the making of such petition become deceased, and may also contain the names and addresses of any other persons whom such testator may desire to make parties to such proceedings.

"Sect. 3. Such judge of probate shall thereupon, upon request of such testator, appoint a time for the hearing of such petition, and issue citations to the parties named in such petition, and direct published notice of such hearing, and have such hearing, after proof of service of citations and of publication of notice, in the manner, as near as practicable, as is required for the probate of wills.

"Sect. 4. If any person named in such petition shall be a minor, or otherwise under disability, a guardian *ad litem* shall be appointed by such judge to represent such person. On such hearing such judge of probate shall examine into the matters alleged in such petition, and into the testamentary capacity of such testator, and examine witnesses in relation thereto, and if it shall appear that the allegations of such petition are true, and that said testator was of sound mind and memory and full testamentary capacity, such judge shall make a decree thereon, and shall cause a copy of such decree to be attached to said will, certified under the seal of said court decreeing that the testator, at the making of such will and such petition, was possessed of sound mind and memory and full testamentary capacity, and that said will was executed without fear, fraud, impartiality or undue influence, which decree shall have the same effect as if made by said court after the death of the testator on the probate of such will, and such will having been so established shall not be set aside or impeached on the grounds of insanity or want of testamentary capacity on the part of the testator, or that the same was executed through fear, fraud, impartiality, or undue influence.

"Sect. 5. Appeals shall be in the same manner as from probate of wills.

"Sect. 6. Nothing in this act contained shall be construed to prevent the revocation of such will, or alteration or other change thereof, as in ordinary wills." Approved April 11th 1883.

The great learning and experience of

Judge CAMPBELL, who delivered the opinion of the court in this case, would certainly lead one to consider well any opinion he might express adverse to the conclusion arrived at.

The question seems to us to be one of considerable difficulty. In the absence of the briefs of counsel we have ransacked the books for some broader and more satisfactory definition of *judicial* power than that given by the learned judge, but without success. We confess to a desire to find some reasonable ground for criticising the conclusion arrived at, for if the unseemly contests respecting the testamentary capacity of testators can be legally prevented, it is a consummation devoutly to be wished. Judge CAMPBELL says: "The broadest definition ever given to judicial power confines it to *controversies between conflicting parties in interest*, and such can never be the condition of a living man and his possible heirs." The italics are our own.

"The difference between the departments [of government] undoubtedly is, the legislative makes, the executive executes, and the judiciary construes, the law:" Per MARSHALL, C. J., in *Wayman* v. *Southard*, 10 Wheat. 46; per GIBSON, C. J., in *Greenough* v. *Greenough*, 11 Penn. St. 494.

That which distinguishes a judicial from a legislative act is, that one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions: *Bates* v. *Kimball*, 2 Chip. 77.

To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department: *Cincinnati, &c., Rd. Co.* v. *Commissioners, &c.*, 1 Ohio St. 81; Cooley Const. Lim. *91.

"The former [judicial tribunals] decide upon the legality of claims and conduct, and the latter [legislative tribunals] make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, —to compare the claims of parties with the laws of the land before established, —is in its nature a judicial act. * * * It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the state:" WOODBURY, J., in *Merrill* v. *Sherburne*, 1 N. H. 204. See, also, generally, Cooley Const. Lim. *90-92.

In all the above definitions, when not expressly so stated, it is assumed that there is a controversy between parties in interest, upon which the court is called to act.

The law of parties to action at law and in chancery, and the well-known rule that a court will not pass upon a mere moot case or one in which there is no real controversy, are also additional evidence of the correctness of the decision in the principal case. Under our system, unlike the Roman civil law, there is no other method of growth of judge-made law except upon actual cases arising between parties in interest. The fact that in a few states by constitutional enactment the legislative or executive departments have been empowered to require the opinion of the Supreme Court "upon important questions of law, and upon solemn occasions," in advance of actual litigation, would seem to lend additional force to the definitions above quoted. See Cooley's Const. Lim. *40.

Upon the whole, Judge CAMPBELL, in the clause above quoted, seems to have struck the key-note of the question, and to have arrived at the true conclusion. However desirable it may be to have a

tribunal for the settlement of various interesting questions between parties not legally interested under our present constitutions, such questions must be relegated to lyceums and debating schools; for if once the principle of the statute in question is conceded to be correct, there is no limit whatever to the number and kind of questions that may be propounded to our courts for discussion, and our courts might easily become moot courts to which all sorts of questions as well as controversies might be brought.

The end sought by the statute is, however, a meritorious one, which might be accomplished by some such system of acknowledgment and record as is applicable to deeds of conveyance. It would be easy to prepare such an act, and it is to be hoped that although the present statute cannot be enforced, it has subserved a useful purpose in drawing attention to a subject than which there are few more important.

MARSHALL D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MAINE.[1]
COURT OF ERRORS AND APPEALS OF MARYLAND.[2]
SUPREME COURT OF OHIO.[3]
SUPREME COURT OF RHODE ISLAND.[4]

ACKNOWLEDGMENT.

By Married Woman—Sufficiency of.—Under a statute which provided that in every case of a deed executed by husband and wife to convey the wife's realty, "the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument shown and explained to her by such magistrate is her voluntary act, and that she doth not wish to retract the same," an acknowledgment was certified to as follows by the magistrate who took it: "Personally appeared S. A. J. and A. J., wife of said S. A. J., to the within and foregoing written instrument and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said A. J. having acknowledged separate and apart from the said husband as the law directs, and that they did not wish to retract the same:" *Held*, that the acknowledgment was fatally defective: *Held, further*, that the statutory provision requiring the deed to be "shown and explained" to the married woman was mandatory, and that the omission from the magistrate's certificate of a statement that the deed had been "shown and explained" to the married woman was fatal: *Paine* v. *Baker*, 15 R. I

BILLS OF LADING.

Cotton Shipped by Mistake to wrong Person—Bona Fide Purchaser.—Z. & Sons, and S., L., K. & Co., of Baltimore, employed the firm of

[1] From J. W. Spaulding, Esq., Reporter; to appear in 77 Me. Rep.

[2] From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

[3] From George B. Okey, Esq., Reporter; to appear in 43 Ohio St. Rep.

[4] From Arnold Green, Esq., Reporter; to appear in 15 R. I. Rep.